Supreme Court of the United States.

DUNCAN *v.* McCALL, *Sheriff.*

Where a petitioner to a Circuit Court of the United States, prays for a *habeas corpus*, under the Fourteenth Amendment, upon the ground that certain State Statutes were not legally enacted, and it appears that the State court has jurisdiction and is exercising it over the petitioner, the petition should be denied and the petitioner put to his writ of error.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Thos. J. McMinn, *A. H. Garland*, and *Heber J. May*, for appellant.

R. H. Harrison, Assistant Attorney General, for appellee.

FULLER, C. J., March 30, 1891. Dick Duncan was indicted by the Grand Jury of Maverick County, Texas, for the crime of murder, and, having been arraigned, was tried in the District Court of that County and State, found guilty, and his punishment assessed at death, and the Court entered judgment accordingly, from which he appealed to the Court of Appeals. He was thereupon committed to the jail of Bexar County, upon the ground that there was no safe jail in Maverick County, McCall, the appellee here, being Sheriff of Bexar County at the time. While the case was pending on appeal, and on the tenth of April, 1890, Duncan filed in the Circuit Court of the United States for the Western District of Texas his petition for a writ of *habeas corpus*, to be discharged from custody, on the ground that he was deprived of his liberty and about to be deprived of his life in violation of the Constitution of the United States.

The petition set forth the finding of four indictments for murder against petitioner, his arrest, trial, conviction, and sentence, and copies of the record were attached. It was alleged that petitioner was deprived of his liberty without due process of law, and denied the equal protection of the laws, because the "Penal Code and Code of Criminal Pro-

cedure" of the State of Texas, now and since July 24, 1879, recognized as law, under which his alleged trial was conducted, were not enacted by the Legislature of the State of Texas, and that the definitions and rules in the supposed Codes were materially different from the definitions and rules of procedure prevailing before their alleged adoption. The petition then averred that the Codes failed of enactment on these grounds, in substance: That the bill which contained them was not referred to a committee and reported on in the House, and was not read on three several days in each House, as required by the State Constitution; and although the Legislature dispensed with the reading of the printed matter *in extenso*, and provided for a consideration on three several days, the bill was not so considered; that the two Houses of the Legislature never agreed to or came to a common legislative intent on the passage of the bill; that neither House of the Legislature kept a journal of its proceedings, as required; that an abortive attempt was made to dispense with enrollment, and there was no enrollment of the bill, or any substitute therefor; that there is no record in existence by which the accuracy of said statutes can be verified; that the Legislature attempted to delegate legislative power to one Lyle, who proceeded to embody the alleged Codes into a printed book, the volume known as the "Revised Statutes of Texas"; that the said volume is not a copy of or identical with the bill said to have been passed embodying them, but is widely variant therefrom, and from the original bill on file in the office of the Secretary of State; that the alleged law set out in the Revised Statutes was never considered or passed by the Legislature of the State, nor considered by the Governor, and did not become a law; that the printing, binding, distribution, and codification of the volume known as the "Revised Statutes" was never duly or legally authorized, and that the entire system of penal and civil laws is involved.

It was further alleged that the Court of Appeals of Texas was organized on the sixth of May, 1876, and that the judges selected to sit upon the bench of that Court were

elected on the third Tuesday in February, prior to the organization of the Court; that the present presiding judge of the Court was at that time elected, and has since continuously succeeded himself; that the Court is interested in the determination of the questions involved, because the statutes supposed to have been adopted, attempted to make new and important provisions for the exercise of jurisdiction and judicial power by the Court, and the civil statutes, which fixed the salaries of judges, determined the jurisdiction of certain judicial districts, and regulated the method of election of judges in the State, were attempted to be enacted at the same time and mainly in the same manner as above set forth; that a decision by any court of Texas upon the questions presented would tend to disturb the alleged and recognized legal system and Code of laws of said State, and cloud the title to office of the judges of the State, and subject the courts to severe criticism, and that petitioner has cause to fear that the courts of Texas would be unduly influenced to his prejudice.

The differences between the prior statutes and codes and those of 1879, which petitioner claimed operated to abridge his rights, privileges, and immunities as a citizen of the United States, and to deprive him of due process of law, seem, as he sets them up, to be that, by the prior law, the punishment of murder in the first degree was death, and the jury could not assess the punishment, so that imprisonment could not be inflicted if the crime were of that degree, whereas this could be done under the later law; that, by the prior law, grand juries were composed of not less than sixteen persons, while by the later, twelve was the number, though this was prescribed by Section 13, Article V, of the Constitution; that challenges to the array were allowed under the prior law for corruption in the summoning officer, and the willful summoning of jurors with the view of securing conviction, whereas, under the later law, while the jurors called upon the trial had been selected by jury commissioners in accordance with a law to that effect enacted in 1876, the challenge to the array was not allowed, but it was not

averred that petititioner attempted to challenge the array; that under the prior law the indictment must charge the offense to have been "felonious" or done "feloniously," whereas, under the Codes of 1879, these words might be omitted, as they were in this instance; and that, under the prior law, sheriffs were prohibited from summoning any person as a juror found within the court house or yard, if jurors could be found elsewhere, but that some of the jurors who tried him were so summoned, although other jurors could have been found in the county.

The Sheriff of Bexar County filed exceptions to the jurisdiction of the Circuit Court, and assigned, among other reasons, that the petition showed upon its face that the matters in controversy did not arise under the Constitution, laws, or treaties of the United States, nor did the adjudication or determination of the same involve a construction thereof, but that the matters arose solely under the Constitution and laws of the State of Texas, and their determination involved exclusively the construction of the State Constitution and laws; that it did not appear from the petition that petitioner was restrained of his liberty and illegally held in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court thereof, or that he was in custody in violation of the Constitution or of a law or treaty of the United States; and that the Circuit Court had no power or jurisdiction to release petitioner from custody, inasmuch as he was held by a duly authorized and qualified officer of the State, under and by virtue of a judgment of a court of the State, in and by which he had been tried, convicted, and adjudged guilty of a crime against the laws of the State, as appeared from the facts set forth in the petition. And the respondent further excepted, upon the ground that the petition was wholly inadequate and insufficient to authorize the relief sought, because it appeared from its allegations that the petitioner was arrested upon an indictment charging him with the commission of the crime of murder, in violation of the laws of the State; that he was arraigned and duly tried and

convicted of the crime as charged, and was by the court, in accordance with the verdict, sentenced, and was now held to await the execution of that sentence, unless reversed by the Court of Appeals of Texas, wherein the case is now pending on appeal from the court below; and that even if the validity of the present Penal Code and Code of Criminal Procedure of Texas were legitimately assailed, yet the petition was wholly insufficient, because there was no allegation that the provisions of the old Code, which in such an event would have remained in force, were in the least dissimilar from the present, or that he would have been tried in a different way, or that he would have or might have received a different or lesser punishment.

May 14, 1890, the Circuit Court, on hearing the application, dismissed the petition and denied the writ. From that judgment petitioner appealed to this court.

By Section 1, Article V, of the Constitution of Texas, the judicial power of the State was vested "in one Supreme Court, in a Court of Appeals, in District Courts, in County Courts, in Commissioners' Courts, in courts of Justices of the Peace, and in such other courts as may be established by law." By Section 3, the jurisdiction of the Supreme Court was confined to civil cases; by Section 6, it was provided that "the Court of Appeals shall have appellate jurisdiction, co-extensive with the limits of the State, in all criminal cases of whatever grade;" and by Section 8, that "the District Courts shall have original jurisdiction in criminal cases of the grade of felony." The District Court of Maverick County was created and organized by an act of the Legislature of Texas approved March 25, 1887: Laws Tex. 1887, p. 46. It had jurisdiction to try the offense of which petitioner was accused, and acquired jurisdiction over his person and the offense charged against him, through the indictment and his arraignment thereon. He was charged with the commission of the crime of murder, which he did not deny was a crime against the laws of Texas, and that the penalty therefor was death. What he complained of in his application to the Circuit Court was that in the matter

of indictment and trial he had been subjected to the provisions of statutes which had not been enacted in accordance with the State Constitution. The District Court had jurisdiction and the power to determine the law applicable to the case, and, if it committed error in its action, the remedy of petitioner was that of which he availed himself, namely, an appeal to the Court of Appeals of the State. Under these circumstances, the Circuit Court properly declined to interfere: *Ex parte Royall* (1886), 117 U. S. 241, 245, 255; *Ex parte Fonda* (1886), 117 U. S. 516.

Nor does the contention of counsel in respect to the Court of Appeals justify any other conclusion. Under Sections 5 and 6 of Article V of the State Constitution, the Court of Appeals was created as a court of last resort in criminal matters, its powers and jurisdiction defined, and the salary, tenure of office, and qualifications of its judges prescribed. The determination of the validity or invalidity of the Civil or Penal Codes of 1879 would in no respect affect that Court in these particulars, if the extraordinary claim of counsel in this regard were entitled to any consideration whatever in this proceeding. Unquestionably it is a fundamental principle that no man shall be judge in his own case, and the Constitution of Texas forbids any judge to sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degree as may be prescribed by law, or where he shall have been counsel in the case; and specific provision is made for commissioning persons to hear and determine any case or cases in place of members of the Supreme Court or Appellate Court, who may be therein thus disqualified: Const., Article V, § 11. But no such question arises, or could arise, upon this record.

The Constitution of the State of Texas was submitted by the Convention which framed it to a vote of the people, on the third Tuesday of February, 1876, for their ratification or rejection, by an ordinance passed for that purpose; and it was provided that, if ratified, it should become the organic and fundamental law of the State on the third Tuesday of

April following; and also that, at the same time that the vote was taken upon the Constitution, there should be a general election held throughout the State for all State, district, county and precinct officers created and made elective by the instrument; and that, if the Constitution were ratified, certificates of election should be issued to the persons chosen: Jour. Const. Con. 772, 780. The Constitution was ratified, and the petition alleged that the judges of the Court of Appeals were elected to their positions on the third Tuesday in February, 1876, and that the Court of Appeals was organized on the sixth of May of that year, from which counsel argues that the conclusion should be drawn that the present members of that Court are not even officers *de facto*. The suggestion requires no observation here.

We repeat that, as the District Court had jurisdiction over the person of the petitioner and the offense with which he stood charged, it had jurisdiction to determine the applicatory law, and this involved the determination of whether particular statutory provisions were applicable or not, and hence, if the question were properly raised, whether a particular statute or statutes had been enacted in accordance with the requirements of the State Constitution.

It is unnecessary to enter upon an examination of the ruling in the different States upon the question whether a statute duly authenticated, approved, and enrolled can be impeached by resort to the journals of the Legislature, or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the State Constitution. The decisions are numerous, and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the State courts on the subject: *Town of South Ottawa* v. *Perkins* (1877), 4 Otto (94 U. S.) 260; *Post* v. *Supervisors* (1882), 15 Otto (105 U. S.) 667; *Railroad Co.* v. *Georgia* (1879), 8 Otto (98 U. S.) 359. In *Town of South Ottawa* v. *Perkins*, where the existence of a statute of Illinois was drawn in question, Mr. Justice BRADLEY, delivering the opinion of the Court, said (94 U. S. 268):

As a matter of propriety and right, the decision of the State courts on the question as to what are the laws of a State is binding upon those of the United States. But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law unless, by the journals of the Legislature, it appears to have been regularly passed by both Houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States. This subject was fully discussed in *Gardner* v. *Collector*. After examining the authorities, the Court in that case lays down this general conclusion: "That whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions; always seeking, first, for that which in its nature is most appropriate, unless the positive law has enacted a different rule": (1868), 6 Wall. (73 U. S.) 511. Of course, any particular State may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but, the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed.

And it has been often held by State courts that evidence of the contents of legislative journals, which has not been produced and made part of the case in the court below, will not be considered on appeal: *Railroad Co.* v. *Wren* (1867), 43 Ill. 77; *Bedard* v. *Hall* (1866), 44 Id. 91; *Grob* v. *Cushman* (1867), 45 Id. 119; *Hensoldt* v. *Petersburg* (1872), 63 Id. 157; *Auditor* v. *Haycraft* (1878), 14 Bush. (Ky.) 284; *Bradley* v. *West* (1875), 60 Mo. 33; *Coleman* v. *Dobbins* (1856), 8 Ind. 156.

The distinction is recognized between matters of which the Court will take judicial cognizance "immediately, *suo motu*," and those which it will not notice "until its attention has been formally called to them": Gres. Eq. Ev. (2 ed.) *395, *408. As to the last, Mr. Gresley says:

It will not point out their applicability nor call for them, but if they are once put in by either party it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own evidence, independently of the parties.

Jones v. *U. S.* (1890), 137 U. S. 202, 216.

As a statute duly certified is presumed to have been duly passed until the contrary appears (a presumption arising in favor of the law as printed by authority, and, in a higher degree, of the original on file in the proper repository), it would seem to follow that wherever a suit comes to issue, whether in the court below or the higher tribunal, an objection resting upon the failure of the legislature to comply with the provisions of the Constitution should be so presented that the adverse party may have opportunity to controvert the allegations, and to prove by the record due conformity with the constitutional requirements: *People* v. *Supervisors* (1853), 8 N. Y. 325.

By the Constitution of Texas, each House of the Legislature must keep a journal of its proceedings, and publish the same, and the yeas and nays of either House on any question shall, at the desire of three members present, be entered on the journals (Article III, § 12); no law shall be passed except by bill, and no bill shall have the force of law until it has been read on three successive days in each House, and free discussion allowed thereon, but in case of imperative public necessity (which necessity shall be stated in a preamble or the body of the bill), four-fifths of the House in which the bill may be pending may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journal (Sections 30, 32); no bill shall be considered unless it has first been referred to a committee and reported thereon; and no bill shall be passed which has not been presented, referred, and reported at least three days before final adjournment (Section 37); the presiding officer of each House shall, in the presence of the House over which he presides, sign all bills, and the fact of signing shall be entered on the journals (Section 38); no law passed by the Legislature, except the general appropriation act, shall take effect

or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency the Legislature by a vote of two-thirds otherwise direct, said vote to be taken by yeas and nays and entered upon the journals, and the emergency to be expressed in a preamble or the body of the act (Section 39). By the law prior to 1876, the journals of the respective Houses were required to be furnished to the public printer, for the purpose of being printed, by the clerical officers of each House (Pasch. Dig. Art. 4872); and the Secretary of State was required to distribute the printed journals (Id. Art. 5092); and similar provision was made by the Act of June 27, 1876 (Laws Tex. 1876, p. 36), as also by the Revised Statutes of 1879 (Rev. St. p. 677, §4012, *et seq.*). When printed, the manuscript journals were to be returned and filed in the archives of the Legislature (Pasch. Dig. Art. 4872; Laws. Tex. 1876, p. 36). It was the duty of the Secretary of State to keep, publish, and distribute the laws (Pasch. Dig. Arts. 5091, 5092, 4872, *et seq.*; Laws Tex. 1876, pp. 35, 313; Rev. St. 1879, pp. 395, 577, §2722, *et seq.*).

The Revised Statutes of Texas, containing the Code in question, were officially published in 1879, with the certificate of the Secretary of State as to the date when the law enacting them went into effect, and that the volume was a true and correct copy of the original bills on file in his department. For eleven years prior to the conviction of Duncan, these Codes had been recognized and observed by the people of Texas; had been amended by the Legislature, and republished under its authority; and their provisions had been repeatedly construed and enforced by the courts as the law of the land. In *Usener* v. *State* (1880), 8 Tex. App. 177, the validity of the Penal Code in respect of its adoption by the Legislature was passed upon and the law upheld; and that case was quoted with approval in *Ex parte Tipton*, 28 Tex. App. 438, a decision rendered as late as February, 1890. This decision ruled that an authenticated statute should be regarded as the best evidence that the required formalities were observed in its passage, and that the courts

would not exercise the power of going behind it and inquiring into the manner of its enactment; and *Blessing* v. *Galveston* (1875), 42 Tex. 641; *Railway Co.* v. *Hearne* (1870), 32 Id. 547, and *Day Land, etc., Co.* v. *State* (1887), 68 Id. 526, were cited in support of the proposition. In one of these cases, it was decided that the judicial department should not disregard and treat as a nullity an act of the Legislature, because the journals of one or both Houses failed to show the passage of the bill in strict conformity with all the directions contained in the Constitution; and in another, that it would be conclusively presumed that a bill had been referred to a committee, and reported on before its passage, as required by the Constitution. The language of the Court in *State* v. *Swift* (1875), 10 Nev. 176, was quoted approvingly in *Usener* v. *State*, and repeated in *Ex parte Tipton:*

> Where an act has been passed by the Legislature, signed by the proper officers of each House, approved by the Governor, and filed in the office of the Secretary of State, it constitutes a record which is conclusive evidence of the passage of the act as enrolled. Neither the journals kept by the Legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received in order to show that an act of the Legislature, properly enrolled, authenticated, and deposited with the Secretary of State, did not become a law. This Court, for the purpose of informing itself of the existence or terms of a law, cannot look beyond the enrolled act, certified to by those officers who are charged by the Constitution with the duty of certifying and with the duty of deciding what laws have been enacted.

In *Usener's* case, the Court declared that although not in duty bound to do so, yet it had nevertheless examined the journals of the two Houses, with regard to the bill entitled "An Act to adopt and establish a Penal Code and Code of Criminal Procedure for the State of Texas," and arrived at the conclusion that the Act had received the legislative sanction in strict conformity with the Constitution, so that, if driven to such examination, the Court was unhesitatingly of opinion that there would be no difficulty in the way of establishing that fact by them in every essential particular.

It is insisted that the extent of the disregard of constitutional requirements was not fully developed in that case, and that its authority was overthrown by *Hunt* v. *State* (1886), 22 Tex. App. 396. But we are not called on to conclude how this may be, or to anticipate the ultimate judgment of the courts of Texas, if they consider the controversy still an open one. If the question of the invalidity of the Codes was presented to the District Court of Maverick County, it must be assumed that it adjudged in favor of their validity; and, as the case has been carried to the Court of Appeals, that it will there be adjudicated in accordance with the law of the State; and when so determined, it is entirely clear that that adjudication could not be reviewed by the Circuit Court or by us, on *habeas corpus*. And the result must be the same if the question has not been raised by the petitioner in the State courts.

We may remark in conclusion that the magnitude of the operation of the objection to these statutes does not affect the principles by which the result is reached. This is not the case of a system of laws attacked upon the ground of their invalidity as the product of revolution. By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

In *Luther* v. *Borden* (1849), 7 How. (48 U. S.) 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had de-

cided the courts were bound to take notice of the decision, and follow it; and also that, as the Supreme Court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied, that the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the Constitution and laws of the State. Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms of the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution, or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions: 6 Webster's Works, p. 217.

Discursive as are the views of petitioner's counsel, no violation of these fundamental principles in this instance is or could be suggested. The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Consti-

tution of the United States, and raises no Federal question giving the courts of the United States jurisdiction. We cannot perceive that petitioner is being otherwise dealt with than according to the law of the land.

The judgment of the Circuit Court is affirmed.

The rule (if rule it can be called) that the Federal courts are governed in their construction of State laws, whether statutory, common or constitutional, by the decisions of the judicial tribunals of the State, was first applied in *McKeen* v. *Delancy's Lessees, &c.* (1809), 5 Cranch (9 U. S.) 22. In that case, the Supreme Court of Pennsylvania had construed the words "justice of the peace," to include a justice of the Supreme Court. The Federal court followed this construction, saying: "Were this act of 1815 now, for the first time, to be construed, the opinion of this Court would certainly be that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be that the deed was not properly proved, and therefore not legally recorded. But in construing the statutes of a State on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the State; and, in this case, the Court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court is within the description of the act."

The rule was applied without discussion in *Polk* v. *Wendell* (1815), 9 Cranch (13 U. S.) 87, and *Thatcher* v. *Powell* (1821), 6 Wheat. (19 U. S.) 119.

In *Elmendorf* v. *Taylor* (1825), 10 Wheat. (23 U. S.) 152, Henry Clay and Chancellor Bibb seem to have argued the question as if one of first impression, with the result that the venerable Chief Justice reaffirmed the rule, and stated with his usual clearness and cogency, the reasoning which supported it: "This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government * * is the appropriate organ for construing the legislative acts of that government." Enlarging upon this general principle of jurisprudence, he concludes: "If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

In *Swift* v. *Tyson* (1842), 16 Peters (41 U. S.) 1, Justice STORY, who had concurred in *Elmendorf* v. *Taylor*, ignored completely the reasons announced in that case as the basis of the rule and declared that it found its authority in Section 34 of the Judiciary Act of 1789 (now § 721, Rev. Stat. U. S.). Standing upon this new foundation, the Court said: "It has never been supposed by us that the Section did apply or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments and especially to questions of general commercial law, where the State tribunals are called upon to perform like functions as

ourselves, that is, to ascertain, upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case." This novel statement as to the origin of the rule passed unchallenged by the associates of Justice STORY, most of whom had participated in the opinion in the *Elmendorf Case* and the exception thus introduced has been affirmed in *Carpenter* v. *Providence & Ins. Co.* (1842), 16 Pet. (41 U. S.) 495; *Carroll* v. *Carroll's Lessee* (1853), 16 How. (57 U. S.), 275; *Watson* v. *Tarpley* (1855), 18 How. (59 U. S.) 517; *Oates* v. *Nat'l Bank* (1879), 10 Otto (100 U. S.) 239; *Brooklyn &c. R. R. Co.* v. *Nat'l Bank* (1880), 12 Otto (102 U. S.) 14; *Norton* v. *Shelby Co.* (1886), 118 U. S. 425, and seems to be too firmly established to be drawn in question.

This exception is an exceedingly unfortunate one, introducing as it does two kinds of law in the same community, one administered by the State courts, the other by the Federal tribunals. Its reasoning is squarely opposed to that found in *Jackson* v. *Chew* (1827), 12 Wheat. (25 U. S.) 153; *Wilcox* v. *Hunt* (1839), 13 Pet. (38 U. S.) 378 (decided before *Swift* v. *Tyson*), and *Bucher* v. *R. R.* (1888), 125 U. S. 555. In the last case, the Court adopted the Sunday law of Massachusetts as a defense against an action brought by a party who had been injured while traveling on Sunday, in violation of the Sunday law.

The next exception is that the Federal courts will not permit the construction of the Constitution or statutes of a State in such a way as to disturb vested rights in contracts protected by the Federal Constitution. This exception has been brought into being almost entirely, by the efforts of State legislators to withdraw from creditors the protection or assistance of laws existing when the contracts were made. *Butz* v. *Muscatine* (1869), 8 Wall. (75 U. S.) 575, is the leading case under that head, followed in *Walker* v. *Whitehead* (1873), 16 Wall. (83 U. S.) 314, the *Virginia Coupon Cases* (1885), 114 U. S. 269, and restrained somewhat in *Supervisors* v. *U. S.* (1867), 4 Wall. 71 U. S.) 435. When the subject of consideration is a contract between States, the rule does not apply: *Marlatt* v. *Silk* (1837), 11 Pet. (36 U. S.) 1; *Jefferson Br. Bank* v. *Skelly* (1861), 1 Black (66 U. S.) 436. It was held by the majority of the Court in *Williamson* v. *Berry* (1850), 8 How. (49 U. S.) 495, that the rule did not apply where the act under construction was for the benefit of a private party. The dissenting opinion by NELSON, J., concurred in by the Chief Justice and Justice CATRON, strenuously combatted this limitation as we think with the better reason. Why the Federal courts should be bound by the exposition of the State courts dealing with a law affecting *all* within its territory and not when *one* person only was interested, is somewhat difficult of comprehension. The same title came back to the Court in *Suydam* v. *Williamson* (1861), 24 How. (65 U. S.) 427, and the Court, in an unanimous opinion, disregarded the ground of the former opinion and reversed the trial court for following the last deliverance of the highest Federal Court and declining to adopt in its stead the decision of the State

court. The opinion is an admirable example of the manner in which the greatest tribunal in the world reverses itself without seeming to do so; as it were, in naive unconsciousness of former conclusions. *Dicta* are never binding: *Carroll* v. *Carroll's Lessee* (1853), 16 How. (57 U. S.) 275.

Burgess v. *Seligman* (1883), 17 Otto (107 U. S.), 20, attempted to establish the exception that where contract rights have arisen under statutory or constitutional provisions which had not been construed by the State tribunals, the Federal courts are not bound to acquiesce in subsequent determinations of the State courts. This limitation upon the rule has been carried to such astonishing lengths that a few of the cases may be especially noticed. In the *Seligman Case*, the question was whether the defendants were liable as stockholders for the debts of a corporation, their exemption from such liability arising directly upon the construction of the Statute of Missouri, regulating that subject. BRADLEY, J., says: "The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to that of the State courts, and *are bound to exercise their own judgment as to the meaning of and effect of those laws.*" With this view of the relation of the Federal courts to the States, he proceeds to examine and reject, unhesitatingly, the construction which the Supreme Court of a sovereign State had put upon its own laws. In *Carroll Co.* v. *Smith* (1884), 111 U. S. 556, this departure was applied to the construction of the Constitution of the State of Mississippi, with a like result. There the Supreme Court of the State had held that certain provisions of the Constitution of the State meant so and so. The Federal Court declining to adopt that view, said: "When therefore it [the decision of the State court] is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, *to determine for themselves what is the law of the State*, by which his rights are fixed and governed." *Olcott* v. *The Supervisors*, *supra*, should be considered in this connection. Here the courts of Wisconsin had held that taxation for a certain purpose was unconstitutional, the purpose not being public. The Federal Court declined to admit as Chief Justice MARSHALL did, "*that the judicial department of every government was the appropriate organ for construing the legislative acts of that government*," or as was stated so clearly by the same learned Judge, in *Bank of Hamilton* v. *Dudley's Lessee* (1829), 2 Pet. (27 U. S.) 492: "*The judicial department of every government is the rightful expositor of its laws and emphatically of its supreme law.*"

In *Beauregard* v. *City of New Orleans* (1856), 18 How. (59 U. S.) 497, the predecessors of Justice BRADLEY said: "They (*i. e.*, the Federal courts) administer the laws of the State and to fulfill that duty they must find them as they exist in the habits of the people and in the expositions of their constituted authorities." In *Wilcox* v. *Hunt* (1839), 13 Peters (38 U. S.) 378, the Court speaking of the trial Federal

court sitting in Louisiana, calls it, in so many words, a court of that State, saying that those who "go into the courts of Louisiana must take their chances there." In *Leffingwell* v. *Warren* (1862), 2 Black (67 U. S.) 599, the Court said the construction given to a statute of a State by the highest tribunal of such State, "is regarded as a part of the statute and is as binding upon the courts of the United States as the text" of it. If the construction placed by the courts of Wisconsin and Mississippi upon their Constitutions became "a part of the text," then there was no duty left the Federal courts but to apply the plain unambiguous text of those instruments.

These are the only recognized limitations upon the rule under consideration. There remains however, properly to be considered in this connection, the attitude which the Federal courts have assumed when the decisions of a State court have not remained consistent with each other. Whether having once adopted the construction of the State courts, they are bound to change with their changes and whether, if the reversal be intermediate, the trial in the inferior Federal court and the hearing of the appeal, it shall be reversed because not in accord with subsequent State decision, are questions which have arisen not a few times. As to the inquiry whether the Federal courts have once adopted the decision of the State courts, shall change with their changes, *Green* v. *Neal's Lessee* (1832), 6 Pet. (31 U. S.) 291, is perhaps the best considered case. The reasons which led to the adoption of the decision of the State courts in the first instance are there declared to be equally cogent in favor of conforming to the altered views of the State authorities, and this view led, in that case, to the overruling of the former decisions (*Patton's Lessee* v. *Easton*, 1816, 1 Wheat., 14 U. S., 476, and *Powell's Lessee* v. *Harmen*, 1829, 2 Pet., 27 U. S., 241), which rested upon earlier decisions of the Supreme Court of Tennessee, and the reversal of the Circuit Court for adhering to those decisions. This determination was, however, expressly made with reference, "not to a single adjudication but to a series of decisions, which shall settle the rule." *Pease* v. *Peck* (1856), 18 How. (59 U. S.) 595, found the same Court when it had first decided a question, declining to surrender its convictions on account of a subsequent decision to the contrary by the State courts. *Morgan* v. *Curtenius* (1859), 20 How. (61 U. S.) 1, affirmed the decision appealed from, although between the trial in the Circuit Court and the hearing on appeal, the Supreme Court of Illinois had overruled the very case on which the trial court rested its conclusion, the reason given being that the later decision of the Supreme Court of the State could not "*make that erroneous which was not so when the judgment of the court was given.*." Almost thirty years before, in *U. S.* v. *Morrison* (1830), 4 Pet. (29 U. S.) 124, the Federal Circuit Court was reversed upon the sole ground that the Supreme Court of the State *had subsequently held otherwise;* while in *Moores* v. *Nat'l Bank* (1881), 14 Otto (104 U. S.) 625, the Circuit Court was again reversed upon the express ground that *the trial court erred in its judgment, because the Supreme Court of the State had subsequently construed the statute dif-*

ferently. In the last case, the Court declined to examine the question independently at all and reversed it solely on the strength of the subsequent decision of the Supreme Court of Ohio.

In the *Morgan Case*, *supra*, the Court examined for itself the position taken by the trial court, and finding it conform to their views, they declined to say it was erroneous because the highest tribunal of the State, charged with the duty of construing the laws of the State, had held otherwise. *Rowan* v. *Runnels* (1847), 5 How. (46 U. S.) 34, is another instance of construing the statutes of a State independently of its tribunals. Having, as we have seen in *Williamson* v. *Berry*, *supra*, declined to follow the State court at all, when the self same title came before them in *Suydam* v. *Williamson* (1861), 24 How. (65 U. S.) 427, the Court held itself concluded by a *single* adjudication of the State Supreme Court, thus ignoring the emphatic statement in *Green* v. *Neal's Lessee* (1832), 6 Pet. (31 U. S.) 291, that it would not "follow a *single* adjudication but a *series of them.*" These cases indicate with sufficient clearness the want of harmony in the decisions of the highest Federal tribunal on this branch of the subject. They are absolutely irreconcilable. I submit with all proper deference that neither the rule or its exceptions can be said to be settled.

The tone of the modern decisions differs essentially from that of the earlier. In the later cases the binding force of State decisions is not stated in the plain language of the earlier opinions. *Hanrick* v. *Patrick* (1886), 119 U. S. 156, states the rule thus: "Great weight, if not conclusive effect, is to be given to these decisions of the Supreme Court of Texas." *Meriwether* v. *Muhlenburg Co.* (1887), 120 U. S. 354, speaks thus of the decisions of the Supreme Court of Kentucky on a question of the organization and composition of a tribunal of the State: "Those decisions are at least entitled to great weight." There is a wide chasm between decisions which are *conclusive* and *not to be re-examined*, and those which *are entitled to great weight.* There will be no harmony as to this rule, or its limitations, until the relations of the Federal courts to the States whose laws they are administering, are more clearly defined. If they are (in the State where they sit) courts of the State applying its laws, then they must of course take those laws as construed and applied by the highest tribunal of such State. To do otherwise is to destroy all stability and certainty in the administration of justice. The fact that diversity of citizenship gives them jurisdiction does not affect this rule. Jurisdiction is not conferred upon the Federal courts in controversies between citizens of different States to protect the non-resident from the operation and effect of the laws of the State, but solely to insure to him, in every State, those contractual rights and remedies which the citizens thereof enjoy. When citizens of different States enter into contracts, they do so in some State, the contracts are to be performed in some State, and the trial court, whether Federal or State, must apply the appropriate law of the place of contract or of the place of performance. The citizen of New York who makes a contract with a citizen of Ohio, to be performed in either, or neither State,

has no claim for a Federal court to protect his rights or redress his wrongs touching that contract. If we are ever to be relieved from the uncertainties which attend the administration of justice in non-Federal cases in the Federal courts, it will be by the adoption of one simple test, easily understood and applied. *If the jurisdiction of the court grows out of the subject matter of litigation, it should be dealt with as if there were no such thing as State courts. If the case does not belong to this class, it should be dealt with as if there were no Federal courts.*

HOMER C. MECHEM.

LEGAL NOTES.

Doles v. *Powell* involved another phase of the Legal Holiday question in Pennsylvania. The case was decided, November 24, 1890, upon this opinion of ARCHBALD, P. J. (reprinted in full from the *Lackawanna Jurist*, pp. 429–31): "By the rule of reference entered by the plaintiff, the choosing of arbitrators was fixed for the thirtieth day of May last. This was Decoration day, and therefore, according to the statute, a holiday. The defendant did not attend and arbitrators were chosen in his absence. The question is whether this was valid. It is a mistake to suppose that the day termed Decoration day is merely a holiday with respect to paper due or presentable at banks. Whatever may be the effect in this regard of the statutes creating the other legal holidays which we have, the act relating to Decoration day is not so limited (Act 28 May, 1874, P. L. 222.) The act is short and I will quote it. [See 29 AMERICAN LAW REGISTER 179.] It will be seen from this that the provision relating to bank-paper is distinct from and subsequent to that section of the statute which establishes the day as a holiday. This therefore cannot be regarded as the controlling purpose of the day; it is merely a legal incident of it, and for the greater certainty finds its way into the statute. The day having been created a holiday, must be given all the incidents of such a day, and among these we recognize the right to be free from the obligation of ordinary compulsory legal process. (See an able and exhaustive article on this subject in Amer. Law Register, vol. XXIX, 137-190). If such be the case, the defendant here was not bound to attend and choose arbitrators upon the day fixed by rule, nor could a lawful choice be made in his absence. The prothonotary had a right to close his office upon that day, and it was to be presumed that he would take advantage of this privilege. The fixing of the day was the act of the plaintiff, and not of the prothonotary, and there was nothing therefore to indicate to the defendant that the office would not be closed. He was not bound for this reason, if for no other, to attend and see whether the office would be open or not. The rule of reference was compulsory, and it was rendered uncertain in its effect by the fact that the day fixed for choosing arbitrators was a holiday, the plaintiff has only himself to blame for it. The choice of arbitrators being invalid, all the subsequent proceedings must fall with it. The rule of reference is set aside, and the award of arbitrators vacated."